No. 87 1053

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In The

Supreme Court of the United States

October Term, 1987

HERMENA PERLMUTTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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2 pp

QUESTION PRESENTED

Did the statutes under which petitioner was convicted, 31 U.S.C. § 5311 *et seq.* and 18 U.S.C. §§ 2 and 1001, provide her with fair warning that dividing a currency transaction of more than $10,000 into smaller segments, unaccompanied by any other acts, would violate those statutes and be construed as a crime?

PARTIES TO THE PROCEEDING

The sole parties to this proceeding are Hermena Perlmutter, he defendant-appellant in the court below, and the United States f America.

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No.

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OPINIONS BELOW

The opinion of the Court of Appeals below is reproduced in the Appendix at page 1a. There are two opinions of the District Court herein. One dismissed counts one through eight of the indictment[1] on petitioner's motion and the other, rendered after

1. The initial indictment was superseded twice. Petitioner was tried on five of the ten counts contained in the second superseding indictment. The Government withdrew the remaining five counts prior to trial and they were thereafter dismissed by the District Court.

trial, convicted petitioner on counts seven and eight and acquitted her on counts one, two and ten. These decisions are reported, respectively, at 636 F. Supp. 219 (S.D.N.Y. 1986) and 656 F. Supp. 782 (S.D.N.Y. 1987).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals below was entered on October 8, 1987. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 31 U.S.C. § 5313(a) which provides as follows:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other

monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

3. 18 U.S.C. § 2(b) which provides as follows:

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. 18 U.S.C. § 1001 which provides as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

5. 31 C.F.R § 103.22(a) (1982) which provides as follows:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

STATEMENT OF THE CASE

Petitioner is an attorney who was convicted in the United States District Court for the Southern District of New York on two counts involving the structuring of the same currency transaction at Emigrant Savings Bank in New York City. One such count charged a violation of 18 U.S.C. §§ 2(b) and 1001 (Count Seven) while the other (Count Eight) charged a violation of 31 U.S.C. §§ 1052(e), 1058, 1081 and 1082[2] and 18 U.S.C. § 2(b).

Counts seven and eight of the indictment, on which petitioner was convicted, together with counts one through six were dismissed before trial by the District Court for legal insufficiency under the Fifth Amendment. That dismissal is reported in the opinion of the District Court at 636 F. Supp. 219. The Government filed a notice of appeal from that order of dismissal.

While the Government's appeal from the order of dismissal was pending, the United States Court of Appeals for the Second Circuit decided *United States v. Heyman, infra.* Based upon the *Heyman* decision, the Government moved in the District Court for reconsideration of the dismissal of counts one through eight.

---

2. The Currency Transaction Reporting Act, subsequently renumbered as 31 U.S.C § 5311 *et seq.*

The District Court granted the Government's motion and thereafter, the Court of Appeals returned the case to the District Court which then vacated its prior order of dismissal.

A bench trial was conducted in the District Court. The Government withdrew counts three through six and ten of the indictment and the District Court either dismissed or acquitted the petitioner on all remaining counts except counts seven and eight on which petitioner was convicted. Counts seven and eight both relate to the same events, namely, the purchase by the petitioner at Emigrant Savings Bank of two separate teller's checks at different times on October 14, 1982, one for $7,000 and one for $5,000. The checks were subsequently used by petitioner's client for the lawful purchase of shares of stock in a residential cooperative corporation.

There was no evidence at the trial that petitioner acted for her personal or pecuniary gain or that she was was involved in any other illegal scheme. On the contrary, the acts alleged in the indictment involved transactions in which petitioner acted as an attorney representing clients in connection with the purchase of a private residence. Petitioner used no false names or accounts and was not employed by the financial institution. The District Court determined that the applicable law in the Second Circuit required the two purchases of the teller's checks to be aggregated and thereby found the petitioner guilty of causing a financial institution to fail to file a Currency Transaction Report (hereinafter "CTR") with Internal Revenue Service in connection with a currency transaction in excess of $10,000. The District Court suspended sentence and placed petitioner on probation for a period of three years.

Petitioner appealed her judgment of conviction to the United States Court of Appeals for the Second Circuit. That court affirmed her conviction and it is from that judgment that review by certiorari is now sought.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW SHOULD BE REVIEWED BECAUSE OF A CONFLICT AMONG THE CIRCUITS OF THE FEDERAL COURTS OF APPEAL ON THE ISSUE RAISED BY THIS CASE.

The principal basis underlying this petition is the conflict between eight Circuits of the Court of Appeals on the issue raised by this case. The petitioner's conviction rests upon her conduct in dividing a currency transaction aggregating more than $10,000, into two parts of less than $10,000 each so that the bank did not file a CTR. On the issue of whether such structuring of a currency transaction can support a conviction, three Circuits, the Second, Fifth and Tenth, have held in the affirmative. However, four Circuits, the First, Seventh, Eighth and Ninth have reversed convictions based upon the same conduct and have thereby taken a position directly contrary to that of the Second, Fifth and Tenth Circuits. The view of the First, Seventh, Eighth and Ninth Circuits is that the applicable statutes and regulations did not provide sufficient notice to the ordinary person that structured transactions would constitute criminal conduct, since those statutes did not impose upon a bank customer a duty to disclose or aggregate such transactions. Another Circuit, the Eleventh, probably shares this view. Accordingly, of the eight Circuits which have reviewed this issue, five have ruled that conduct similar to petitioner's would not constitute a crime.

The most prominent case in support of petitioner's position is *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985). There, the defendant structured various bank transactions in order to keep each one under $10,000. Some of these transactions were confined to a single day while others were not; on one single day,

defendant Anzalone purchased three checks from the same bank, all of which totaled $25,000 but no one of which exceeded $10,000. Thereafter, but on different dates, Anzalone purchased additional checks, each of which was limited to less than $10,000, for a total of $100,000.

The theory of the prosecution in *Anzalone*, as in the instant case, was that this was a "structured" transaction which was per se illegal. Since the defendant failed to inform the bank of the "structured" nature of his transfers, the Government argued, he caused the bank to fail in its duty to report these transfers. The basic issue was whether defendant had sufficient fair warning that such failure by him to alert the bank subjected him to criminal sanctions under the same statutes and regulations involved in the instant case. The facts of *Anzalone* are indistinguishable from those of this case except that *Anzalone* also had other transactions, on different dates, for which he was also convicted in the District Court. Any effort to confine the *Anzalone* case to one involving transactions on separate dates fails to reflect the facts therein; Anzalone's first three purchases, totaling over $25,000, all occurred on a single day, November 13, 1980.

In *Anzalone*, the First Circuit concluded that nothing in either the statute or regulations supported the proposition that a structured transaction by a customer constituted an illegal evasion. In reaching this conclusion, the First Circuit turned to a report to Congress by the Comptroller-General of the United States dated July 23, 1981. That report acknowledged the deficiencies in the regulations consisting of silence on the subject of multiple transactions. The report recommended a revision of the regulations to proscribe dividing a large transaction into smaller transactions, a recommendation subsequently followed by the enactment of new legislation. The fact that one agency of the Government, interested in enforcement and implementation of the law, recognized that the Act was deficient by silence or lack of clarity

should be persuasive evidence of the vagueness of the Act on this point.

The First Circuit found "confusion and uncertainty" in the law and held that it could not impose a legal duty on the defendant by judicial implication. The Reporting Act and its regulations imposed no duty on the defendant to inform the bank of the "structured" nature of his transactions. The application of criminal sanctions for these activities violated the fair warning required by the due process clause of the Fifth Amendment. Similarly, there was no illegal concealment under 18 U.S.C. § 1001 since the defendant had no legal duty to disclose. In this context, it was also noted that defendant did not aid, abet or cause the commission of a crime. Since the bank was not aware of the "structured" nature of the transaction and the statute did not require the bank to aggregate divided transactions, its failure to report did not constitute an offense.[3]

After *Anzalone*, and relying on its reasoning, the Court of Appeals for the Seventh, Eighth and Ninth Circuits reversed convictions under the Currency Transaction Reporting Act. The Ninth Circuit has uniformly followed *Anzalone* in its decisions in *United States v. Reinis*, 794 F.2d 506 (1986), *United States v. Varbel*, 780 F.2d 758 (1986) and *United States v. Dela Espriela*, 781 F.2d 1432 (1986).

In *United States v. Reinis*, the defendant was convicted based on a series of currency conversions at banks, each for less than $10,000, extending over ten days during which he and his agents purchased cashier's checks totaling more than $10,000 from the

---

3. At that time Form 4789, the Currency Transaction Report, required the financial institution to treat multiple transactions in one day totaling more than $10,000 as a single transaction and to report them "if the financial institution is aware of them." Form 4789, however, was not intended to be exhibited to customers.

same bank. Aside from structuring his transactions, the defendant committed no other acts to conceal their nature.

In *United States v. Varbel*, the defendants avoided a triggering of the filing requirements by purchasing cashier's checks at different banks. The Ninth Circuit again concluded that the statute did not impose a duty upon defendants to inform the different banks of the nature of their transactions, *i.e.*, that they were simultaneously conducting similar transactions at other banks. Such a duty, the court held, could not be imposed by implication but only by clear and unambiguous language.

United States v. Dela Espriela also involved only structured transactions by a bank customer. There, one of the defendants had currency converted into cashier's checks at many different banks. The counts of the indictment based on alleged violations of the Currency Transaction Reporting Act were all dismissed as legally insufficient based on *United States v. Varbel, supra*.

The Eighth Circuit followed *Anzalone* in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). There, the defendant was convicted under the Currency Transactions Reporting Act and under 18 U.S.C. § 2 because of structured transactions. On one day, he converted $44,500 in currency into cashier's checks. Several weeks later, he repeated the process with $53,300 in currency. Each separate transaction was less than $10,000 and the transactions were conducted at several different banks. Although the opinion does not so state, it appears that at some banks the total of the transactions exceeded $10,000 on the same day. The Eighth Circuit, following *Anzalone* and *Varbel*, held that the defendant had no duty to disclose the unitary nature of the transactions and therefore was not guilty of concealing information from the Government.

In *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987),

the defendant divided a single transaction into several bank deposits. On each day the deposits aggregated more than $10,000 so that the structuring of these transactions caused the depository bank to not file CTRs. The Seventh Circuit first found that the Currency Transaction Reporting Act did not impose any duty upon the bank in question to file a report of the structured transaction. Proceeding from this premise, the court held that the transactions did not constitute "material facts" within the meaning of 18 U.S.C. § 1001 so that the defendant could not be liable under 18 U.S.C. § 2(b) for causing the bank to fail to disclose a material fact. The opinion expressly rejected conflicting decisions in other Circuits and the reasoning underlying those decisions.

The Eleventh Circuit, in *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986) appears to follow *Anzalone*. Denemark purchased cashier's checks from several banks although he did not transact more than $10,000 of business at any single bank. There was no transaction at any one financial institution which would have required that institution to file a CTR even if it had been aware of the transactions at the other institutions. On this basis, the conviction was reversed, the 11th Circuit rejecting the Government's argument that all of the transactions should be considered together in a substance over form analysis. *But see, United States v. Cure,* 804 F.2d 625 (11th Cir. 1986).

The Second Circuit's decisions holding that structuring a currency transaction will support a conviction are *United States v. Heyman*, 794 F.2d 788 (1986), *cert. denied,* 107 S. Ct. 585 (1986) and *United States v. Nersesian*, 824 F.2d 1294 (1987). In *Heyman,* defendant was an account executive at Merrill Lynch, a "financial institution" as defined under the Currency Transaction Reporting Act. He was approached by a potential customer who disclosed that he wished to invest a large amount of untaxed cash. To avoid the filing of CTRs by his employer,

the defendant opened a series of accounts in the names of various people, each with a currency deposit of less than $10,000. The defendant knew that the names of these people were being used merely as "fronts" for one customer, to falsify and conceal the identity of the customer and the source of the currency. The Second Circuit affirmed the defendant's conviction. In *Nersesian*, the defendants were convicted of conspiring to conceal material facts by causing a bank not to file CTRs in violation of 18 U.S.C. § 371. The opinion notes the division among the Circuits on the question of whether a bank customer can be prosecuted for causing a bank to fail to file a report by not disclosing the structured nature of the transaction. The affirmance in *Nersesian* is therefore a continuation of the Second Circuit's position on this point.

The Fifth Circuit and the Tenth Circuit, based on one decision in each of those Circuits, are apparently in agreement with the Second Circuit in espousing the view that a bank customer can be convicted for failing to disclose the nature of divided transactions. *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979); *United States v. Cook*, 745 F. 2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220, 105 S. Ct. 1205 (1985). *Thompson* possibly does not fully disclose the views of the Fifth Circuit since the defendant in that case was the Chairman of the Board of the bank. On the other hand, the Second Circuit has stated in *Heyman* that there is no basis for distinguishing between a customer and a bank employee. 794 F.2d at 792, n. 6.

In now urging the issuance of a writ of certiorari, petitioner is aware of the denial of certiorari by this Court in *United States v. Heyman, supra*. Since that denial, however, it has become apparent that the division among the Circuits is real and that the conflict has become more pronounced. Moreover, the majority of the Circuits which have now ruled on this issue would have reversed this petitioner's conviction.

Even after *Heyman*, it was possible to attempt to harmonize the various decisions. Heyman's conduct, aside from violating the Currency Transaction Reporting Act, was otherwise wrongful. He violated other criminal statutes as well as securities laws. On a subjective basis, Heyman therefore could not credibly assert that he did not have appropriate notice of the wrongful nature of his acts. With its decisions in *Nersesian* and the instant case, however, the Second Circuit has clearly taken a position at odds with that of the First, Seventh, Eighth and Ninth Circuits.

Without further review of the instant case, the petitioner will remain convicted for acts which, if committed within the jurisdiction of a majority of the other Circuits, would not have supported a conviction. In the case at bar, the petitioner suffers not only the usual disabilities of a criminal conviction but the loss of her professional license which she maintained in good standing for a period of over thirty years prior to her conviction.

II.

THE DECISION BELOW SHOULD BE REVIEWED SINCE THE CONDUCT OF THE PETITIONER CONSISTED ONLY OF STRUCTURING A CURRENCY TRANSACTION AND WAS NOT ACCOMPANIED BY WRONGFUL ACTS.

Petitioner also urges that the Currency Transaction Reporting Act was not sufficiently clear to provide her with fair warning that her conduct was proscribed. That conduct consisted of nothing more than dividing a currency transaction into two segments. The Act and the Regulations promulgated thereunder imposed a duty only upon financial institutions to file reports. Although the Act empowered the Secretary of the Treasury, by regulation, to impose the reporting duty on bank customers, the Secretary elected to require reporting only by financial institutions and not by their customers. When petitioner structured her currency transactions,

she reasonably believed that her conduct was not criminal, particularly since she did not employ an alias and was engaged in no other illegal activity. The duty to disclose the facts of a currency transaction should not be imposed by implication, when the penalty is a criminal violation and no illegality is contemplated.

Only the Second Circuit has been willing to affirm a conviction based on solely structuring a currency transaction unaccompanied by other wrongful acts. Where structuring a currency transaction is involved, the affirmance of the conviction has almost invariably occurred where the structuring was abetted by other wrongful acts. When such other wrongful acts are present, the conviction has been affirmed. Conversely, if the facts reveal nothing more than a structuring of a currency transaction, a reversal has resulted. A brief summary of various Court of Appeals decisions establishes this point.

In the following cases, the conviction was affirmed when other wrongful acts accompanied the structuring of the currency transaction: *United States v. Thompson, supra* (defendant was the Chairman of the Board of a bank who abused his authority to effect fictitious loans designed to cover cocaine purchases); *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant acted in concert with a confederate, both of whom used false names, concealing the fact from the bank that they were acting together); *United States v. Puerto*, 730 F.2d 627 (11th Cir., 1984), *cert. denied sub. nom, Everett v. United States*, 469 U.S. 1037, 105 S. Ct. 162 (1984) (defendant conspired with a bank employee who was instructed to place fictitious names on the bank checks and on the currency transaction reports); *United States v. Sans*, 731 F.2d 1521 (11th Cir. 1984),*cert. denied*, 469 U.S. 111, 105 S. Ct. 791 (1985) (defendants acted in concert with two bank officers); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220, 105 S. Ct. 1205 (1985) (defendants employed false identification); *United States v.*

Heyman, supra (defendant was an employee of a financial institution who encouraged his customer to open separate accounts in nominee names); *United States v. Giancola*, 783 F.2d 1549 (11th Cir. 1986) (fictitious names used); *United States v. Cure, supra,* (bank checks purchased in connection with a money-laundering scheme bearing fictitious names); and *United States v. Nersesian, supra* (conspiracy among multiple defendants to violate narcotics laws directly leading to violations of the Currency Transaction Reporting Act).

Each case, other than the instant one, which involved only the structuring of a currency transaction, without other illegal acts, has resulted in a reversal of conviction. *See United States v. Anzalone, United States v. Dela Espriela, United States v. Reinis* and *United States v. Gimbel*, all *supra.* The validity of the distinction now urged by petitioner has been recognized by the Eleventh Circuit, which has both affirmed and reversed convictions for violations of the Currency Transaction Reporting Act. That court stated in *United States v. Cure*, 804 F.2d at 627:

> Appellant is also correct in arguing that bank customers have no obligation to structure their transactions so as to trigger the reporting requirements of Section 5313. *United States v. Denemark*, 779 F.2d 1559, 1561-64 (11th Cir. 1986).

Later, at 804 F.2d 629, that court said:

> . . . a bank customer is not liable *merely* for structuring his cash transactions so as to create transactions in which the filing of a CTR is not required. (Emphasis supplied.)

With this language in mind, it is clear that the Eleventh Circuit, as well as the First, Seventh, Eighth and Ninth Circuits, would

have reversed petitioner's conviction on the ground that she did nothing more than structure her transactions without any concomitant criminal conduct. Accordingly, petitioner presently occupies the unenviable position of being the only person convicted under the Currency Transaction Reporting Act based solely upon the division of a currency transaction into segments without any other improper conduct.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment herein of the United States Court of Appeals for the Second Circuit. It is respectfully requested that this petition for such a writ be granted.

Respectfully submitted,

STEVEN W. WOLFE
Attorney for Petitioner

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LEO KAPLOWITZ
Of Counsel

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 8th day of October, one thousand nine hundred and eighty-seven.

PRESENT:

HONORABLE GEORGE C. PRATT,
HONORABLE FRANK X. ALTIMARI, Circuit Judges,
HONORABLE FRANK A. KAUFMAN, District Judge
(U. S. District Court for the District of Maryland, sitting by designation.)

No. 87-1232

UNITES STATES OF AMERICA,

Appellee,

-against-

HERMENA PERLMUTTER

Defendant-Appellant.

This appeal from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, came on to be heard on the transcript of the record and was argued by counsel.

Appendix A

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from be and hereby is affirmed. Constrained by *United States v. Nersesian*, 824 F.2d 1294 (2d Cir. 1987), and *United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 107 S. Ct. 585 (1986), we hold that defendant's conduct in structuring her bank deposits did constitute criminal conduct in violation of 31 U.S.C. § 5313 when supplemented by 18 U.S.C. § 2(b).

s/ George C. Pratt
George C. Pratt, U.S.C.J.

s/ Frank X. Altimari
Frank X. Altimari, U.S.C.J.

s/ Frank A. Kaufman
Frank A. Kaufman, U.S.D.J.

Filed October 8, 1987

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

No. 87-1053

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vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 19, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Cr. 207 (RWS)

UNITED STATES OF AMERICA,

-against-

HERMENA PERLMUTTER,

Defendant.

OPINION

APPEARANCES:

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SWEET, D.J.

Hermena Perlmutter ("Perlmutter") has been indicted and tried for money laundering, once in March, 1981 and again in October, 1982, and for making a false statement to an Internal Revenue Service ("IRS") agent. Specifically, Counts One and Seven of the second superseding indictment charge Perlmutter with causing material information to be concealed from the IRS by trick, scheme or device, in violation of 18 U.S.C. §§ 1001 and 2(b). Counts Two and Eight charge Perlmutter with causing a financial institution to fail to file currency transaction reports in violation of 31 U.S.C. § 1058 (in effect in March, 1981) and 31 U.S.C. § 5322(a) (the recodification of 31 U.S.C. § 1053, in effect in October, 1982). Count Ten charges Perlmutter with the making of a false statement on May 9, 1984, in violation of 18 U.S.C. § 1001.

This was a particularly hard case, well tried by skillful counsel for both the government and Perlmutter. It is painful to see a well-regarded defense counsel in the role of a defendant when the result turns upon a legal definition of intent and aiding and abetting under a since-amended statute, a definition about which reasonable men by definition can differ. Further, the difficulties are increased by the proof which overcame the presumption of innocence by the application of rational inference rather than the resolution of the credibility of witnesses with respect to a contested fact. Notwithstanding, on the facts as found below after a four-day bench trial, Perlmutter is found guilty on Counts Seven and Eight, and not guilty on Counts One, Two, and Ten.

Prior Proceedings

The original two-count indictment was filed in this case on March 10, 1986. The nine-count superseding indictment, filed April 17, 1986, was the subject of a motion to dismiss Counts One through Eight pursuant to Fed.R.Crim.P. 12(b)(2) on the grounds that these counts were facially insufficient. In its opinion of May 20, 1986, relying upon the analysis contained in *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985), this court dismissed Counts One through Eight on the basis that private persons like Perlmutter cannot incur criminal liability for apportioning transactions to avoid reporting requirements imposed on financial institutions. The government appealed from this decision.

On June 27, 1986, while this case was on appeal, the Second Circuit, in *United States v. Heyman,* 794 F.2d 788 (2d Cir. 1986), held contrary to the conclusion reached by the First Circuit in *Anzalone* and to the effect that under 18 U.S.C. §§ 5311, 5313, and 5322, a private party could be convicted of willfully causing transactions to be structured so as to cause a financial institution to fail its legal responsibility to file currency transaction reports. In light of that opinion, this court on the government's motion reversed its prior decision.

On June 11, 1986, the second superseding indictment was filed. Before trial, Counts Three through Six were dismissed on motion of the government. On the first day of trial, January 27, 1987, the court granted the government's motion to sever Count Nine, which charged Perlmutter with obstruction of justice in violation of 18 U.S.C. § 1503.

Findings of Fact

Perlmutter is an attorney whose practice consists mostly of criminal defense and who capably acted for the defense in at least

two trials before me. During the period in question, Perlmutter had an office at 20 Vesey Street. In her employ were Laura Nadal ("Nadal"), who acted as secretary and receptionist, and Perlmutter's nephew, David Van Muraskin ("Muraskin"), an attorney.[1] Muraskin worked both on Perlmutter's cases and on his own § 18(b) cases.

In early 1981, Perlmutter, assisted her client Daniel Washington ("Washington") (later convicted of drug offenses), who declared little or no income for the years 1979-1982, in the purchase of four apartment buildings located at the corner of Seventh Avenue and 134th Street. The contract price was $60,000 — $6,000 of which was paid as a down payment by a check drawn by Perlmutter on her special account on January 29, 1981.[2] On March 2, Perlmutter incorporated for Washington the 2283 7th Avenue Corporation. At the closing on March 12, 1981, the balance of the purchase price was paid by monetary instruments as follows:

With cash supplied by Washington, Perlmutter on March 11, 1981, purchased $29,000 in Emigrant Savings Bank ("Emigrant") tellers' checks at her local branch.[3] The checks were in amounts of $1,000, $2,000, $3,000, $4,000, and $5,000, made payable to Preston Homes, Inc.; $5,000 and $5,000, made payable

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1. Seth Kaplowitz, another of Perlmutter's nephews, also worked in the office at some time during this period, but no evidence was produced which would link him with any of the transactions at issue.

2. Jerry Brown, the seller of the property, testified that the signing of the contract was handled by his attorney and Perlmutter. Brown did not meet Washington until the day of the closing.

3. Perlmutter actually purchased a total of $33,290.00 in tellers' checks, but only $29,000 of those checks were shown to have been paid to Preston Homes in connection with this transaction.

to Hermena Perlmutter.[4] The manager of Perlmutter's branch of Emigrant, Evelyn McLoughlin ("McLoughlin"), filled out a Currency Transaction Report ("CTR") for this transaction. McLoughlin testified that she almost always told customers at the time of the transaction that she was filling out a CTR. She explicitly recalled telling Perlmutter that she was doing so on one occasion, to which Perlmutter replied, "I have no objection to that. I have nothing to hide."

On the same day, March 11, $9,800 in cash was deposited in Perlmutter's special account at the Broadway branch of Merchants Bank of New York ("Merchants"), and $9,800 in cash was deposited in Muraskin's special account at the same branch.[5] The deposit slips for each were time-stamped 1:43 p.m. and 1:44 p.m., respectively, by the same teller. The handwriting on the deposit slips could not be identified by the government's handwriting expert as belonging to either Perlmutter or Muraskin, but it was identified as belonging to the same writer. The slip for the deposit into Perlmutter's account was pre-printed with Perlmutter's name and account number; the slip for the Muraskin deposit was a blank deposit slip, available at the bank, with Muraskin's name and account number filled in.

On the next day, the morning of the closing, $200 was deposited in each of Perlmutter's and Muraskin's special accounts at the Third Avenue branch of Merchants. The deposit slip for the Perlmutter deposit, which was time-stamped 9:23, was pre-printed with Perlmutter's name and account number, and the writing was identified as Perlmutter's. The slip for the Muraskin

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4. At the Emigrant Savings Bank, the only limit to the amount for which a tellers' check can be drawn for a customer is one million dollars.

5. The two $9,800 deposit are the subject of the violations charged in Counts One and Two.

deposit, time-stamped 9:29, was also pre-printed with Muraskin's name and account number.

That same day, Perlmutter and Muraskin each drew a certified $10,000 check on their respective special accounts, payable to the 2283 7th Avenue Corporation. These checks for a total of $20,000 were not actually used at the closing; instead Perlmutter drew a check for $20,500 on her special account, payable to the Title Guarantee Company, to cover back taxes. The $29,000 in tellers' checks were given to Jerry Brown, the president of Preston Homes, the seller of the property, at the closing on March 12, 1981.[6] The two $10,000 checks were endorsed back to Perlmutter and Muraskin, respectively, by Washington, and deposited into Perlmutter's account the next day, March 13, by Muraskin at the Third Avenue branch at 9:35 a.m.

The subject of Counts Seven and Eight is a transaction in connection with a purchase of real estate participated in by Perlmutter, in August through October, 1982, on behalf of her clients Peter Monsanto ("Monsanto") and Debra Manson ("Manson") for the purchase of a cooperative apartment at 3240 Riverdale Avenue in the Bronx. Monsanto and Manson, like Washington, reported no income for the years 1978 through 1982. Monsanto first sought to purchase the co-op in the name of Doll Holding Corp., which Perlmutter had incorporated for him in November, 1981. When the seller refused to sell to a corporation, Monsanto first had the contract drawn up in his name, but then substituted Manson's name.

The purchase price for the co-op was $30,000, $3,000 of which was paid in August, 1982, and the remaining $27,000 of which

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6. Present at the closing were Perlmutter, Washington, Jerry Brown, the Title Guarantee Company representative, and a man identified by Jerry Brown as a "relative" of Perlmutter's.

was paid at the time of closing in October, 1982. Nadal testified that in connection with this transaction Monsanto brought to Perlmutter's office an attache case containing $25,000 to $30,000 in small bills, which she and Monsanto counted. Nadal then gave the attache case to Perlmutter when Perlmutter returned to the office. The remaining $27,000 was paid with the following checks and money orders:

On October 13, Nadal purchased a $5,000 cashier's check from Republic National Bank, to the order to Hermena Perlmutter. On the following day, October 14, Nadal purchased another $5,000 Republic cashier's check to the order of Hermena Perlmutter. On the back of each check Perlmutter wrote "Re: Purchase of Co-op shares, 3240 Riverdale Ave., Apt. 6E, Bronx, N.Y."

That same day, ten $500 money orders were purchased from Union Federal Savings. All were made to the order of T & C Builders Co. and labelled "Re: Purchase of 3240 Riverdale," in Muraskin's handwriting. In addition, half of them were undated and listed Manson as "sender," in Muraskin's handwriting; the other half were dated October 14, 1982 and listed Manson as "sender," all in Perlmutter's handwriting.

Also on October 14, two different tellers at the Emigrant convenience branch issued two tellers' checks; one for $5,000 to the order of Hermena Perlmutter, the other for $7,000 to the order of Manson. On the back of each check Perlmutter wrote "Re: Purchase of Co-op shares, 3240 Riverdale Ave., Apt. 6E, Bronx, N.Y." The check request form for the $5,000 check was filled out by Muraskin. Although McLoughlin testified that she had searched the bank records and could not find the check request form for the check made out to Manson, she testified that Manson was not a customer of the bank and tellers' checks were only issued to customers (money orders were given to non-customers).

McLoughlin also testified that Muraskin often came to the bank on behalf of Perlmutter. The two Emigrant tellers' checks are the subject of Counts Seven and Eight of the indictment.

Count Ten

In August, 1981, Perlmutter participated in the purchase of a house at 35 Mountain Way, West Orange, New Jersey, by Glen and Diane Brown, who, like Washington, Monsanto and Manson, filed no tax returns for the years 1979-1982. The agreed price for the house was $140,000, with $14,000 as a down payment and the balance at closing. Perlmutter herself signed the contract of sale, which did not refer to the Browns. Perlmutter arranged to make the $14,000 down payment through the following transactions:

On August 19, 1981, Perlmutter purchased four Emigrant Savings Bank tellers' checks, in denominations of $5,000, $3,500, $3,500 and $2,000. A CTR was filed for this transaction. The next day, August 20, those tellers' checks were deposited into her special account at Merchants, at two different times in the day. Two of the checks, for $5,000 and $3,500, were deposited at 9:13 a.m. on August 20 at the Third Avenue branch, using two separate deposit slips, dated August 19 and filled out in Perlmutter's handwriting. The other two checks were deposited at 1:22 p.m., also using two separate deposit slips dated August 19, and in Perlmutter's handwriting. Perlmutter drew a $14,000 check, dated August 19 on her special account, payable to the sellers of the house.

The balance of the purchase price was paid at the closing on November 9, 1981. The deed to the property listed Saul and Ruth Robbins as seller, and 35 Mountain Way Corporation, a corporation formed by Perlmutter for the Browns, as buyer. At 2:10 p.m. that day, Perlmutter deposited $120,000 in $10s and

$20s into her special account at the Third Avenue branch of the Merchants Bank using a non-preprinted deposit slip. A CTR was filed for this transaction. She then drew a certified check for $120,000 on that account, payable to Ruth and Saul Robbins, and added a check for $89.76 and a Merchants teller's check for $6,000 to make up the balance.

During an IRS investigation of Washington, Special Agent Gregory Polvere ("Polvere") had discovered the CTR filed in connection with Perlmutter's $120,000 deposit on November 9, 1981. Because the transaction occurred one day after a raid on a building owned by Washington at 119 West 130th Street, in which large quantities of narcotics and money were seized, Polvere suspected that the $120,000 might have been cash paid by Washington to Perlmutter in connection with proceedings following that search. Thereafter, on or about January 30, 1984, a grand jury subpoena was issued to Merchants for the relevant records, but the bank was unable to produce records for November and December of 1981. On May 9, 1984, Polvere interviewed Perlmutter at her office.[7] In response to questions about the $120,000 deposit, Perlmutter stated that the $120,000 belonged to someone other than Washington, whom she refused to identify. She told Polvere that the bank had contacted her to ask her for her November, 1981 statement, that she had searched her files and was unable to find it, and had no idea where the check or corresponding statement was. She said she had no objection to giving the statements to them, but she just could not find them. She also told Polvere that she would not discuss her dealings with clients with him.

During a subsequent IRS civil audit of Perlmutter, Special Agent Richard Burnside requested Perlmutter's attorney, Donald

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7. Although Special Agent James MacKenna was also present at the interview, he did not testify at trial.

Israel ("Israel") to furnish materials relating to the $120,000 deposit. Israel asked Bernard Tobacman ("Tobacman"), a CPA who did accounting work for Perlmutter, to get the documents from Perlmutter's office. Tobacman went to the box in a cabinet in Perlmutter's office where he knew the bank records for the past four or five years were kept and found and copied the bank records in question. Tobacman also testified that Perlmutter's two or three most recent statements were kept in her desk drawer, until either he or his daughter, also an accountant, entered them into records and put them in the box.

Conclusions

Perlmutter is alleged to have violated 18 U.S.C. §§ 1001 and 2(b) by knowingly withholding from the government material information concerning the two $9,800 deposits on March 11, 1981 (Count One) and material information concerning the $5,000 and $7,000 transactions on October 14, 1982 (Count Seven). She is also alleged to have violated 31 U.S.C. §§ 5312(a)(2), 5313 and 5322 and 18 U.S.C. § 2(b) by causing the Merchants Bank to fail to file a CTR in connection with the two $9,800 deposits on March 11, 1981 (Count Two) and causing the Emigrant Bank to fail to file a CTR in connection with the $5,000 and $7,000 transactions on October 14, 1982 (Count Eight).

The Currency and Foreign Transactions Reporting Act, presently codified in 31 U.S. §§ 5311 *et seq.*, authorizes the Secretary of the Treasury to require financial institutions to file "certain reports or records hav[ing] a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. Section 5313(a) provides that a domestic financial institution, involved in a transaction for the payment, receipt, or transfer of United States currency in an amount or under circumstances that the Secretary prescribes, shall file a report in the time and manner that the Secretary prescribes. 31 U.S.C.

§ 5313(a).[8] The Secretary's regulations in effect at the time of these events are set forth in 31 C.F.R. § 103.22(a) (1982):

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

The reporting form which the Secretary issued during the relevant period contained the following statement:

> Multiple transactions by or for any person which in one day total more than $10,000 should be treated as a single transaction if the financial institution is aware of them.

IRS Form 4789.

In *United States v. Heyman,* 794 F.2d 788 (2d Cir. 1986), the Second Circuit held that deposits totaling over $10,000, made at the same financial institution on the same day, trigger a CTR filing requirement under 31 U.S.C. § 5313(a). Although the statute applies on its face to financial institutions alone, the Court held that private persons could be convicted of willfully structuring transactions so as to cause a financial institution to fail to file a CTR. The court stated that although the facts involved an employee of the institution, a customer who structured his transactions with the intent to conceal from the institution the

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8. The corresponding section of former Title 31, 31 U.S.C. § 1081, was essentially the same.

need to file a CTR would be criminally liable under § 2(b) for causing the bank to violate the reporting requirement. *See* 794 F.2d at 792 n.6. This, the Court noted, was a necessary result of the language of 18 U.S.C. § 2(b) which does not distinguish between customer and employee when it provides that "*[w]hoever* willfully causes an act to be done which if directly performed by him would be an offense against the United States" is liable for that act.

In the intervening period between Perlmutter's financial transactions and the present, Congress explicitly imposed liability on private persons for the conduct at issue here, *see* 26 U.S.C. § 6050I (West Supp. 1986), thus placing a reporting burden on any person who receives in excess of $10,000 in one or two or more related transactions:

> (a) Cash receipts of more that $10,000.00 — Any person —
>
> > (1) who is engaged in a trade or business, and
> >
> > (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
>
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

The present case, of course, is being tried under 31 U.S.C. § 5313(a), which does not by its express terms address the conduct of persons other than financial institutions.

The government must show on each of Counts Two and Eight 1) that the defendant caused the financial institution to fail to file a CTR when it was required to do so and 2) that the defendant acted "willfully" in causing the institution to fail to file a CTR. In order to act "willfully," the defendant must know that banks are required to report currrency transactions totally over $10,000 to the government, and have intended to foil that reporting obligation. *See United States v. Nersesian,* S 84 Cr. 1034 (charge of the court at Tr. 10,705-10). Circumstantial evidence alone is often sufficient to show criminal intent. *See United States v. Natelli,* 527 F.2d 311, 318 (2d Cir. 1975), *cert. denied,* 425 U.S. 934 (1976).

The charges under Counts One and Seven of violations of 18 U.S.C. § 1001 involve the same acts on the part of Perlmutter. Section 1001 provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

While the concealment of a fact that no one has a legal duty to disclose may not be a violation of this section, *see United States v. Irwin,* 654 F.2d 671, 678 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982), which is not the case where a regulation or form requires disclosure. *Id., cited in United States v. Tobon-Builes,* 706 F.2d 1092, 1097 (11th Cir. 1983). Although the reporting requirements under the Currency and Foreign Transactions Reporting Act apply on their face only to financial institutions, the *Heyman* court's interpretation of 18 U.S.C. § 2(b) requires the conclusion that under 18 U.S.C. § 1001 as well as 31 U.S.C. §§ 5311 *et seq.* the customer of a financial institution

is required to disclose that cumulative deposits of over $10,000 are in fact all one transaction. *See Heyman, supra.* 794 F.2d 738; *see also Tobon-Builes, supra.* 706 F.2d at 1099. This is so "even though the financial institutions had no criminal intent and thus were innocent of any concealment under section 1001." *Tobon-Builes, supra,* 706 F.2d at 1100; *see Heyman, supra,* 794 F.2d 788.

An essential element of a violation of 18 U.S.C. § 1001 is that the fact concealed is material. *See United States v. Marchisio,* 344 F.2d 653, 666 (2d Cir. 1965). In this case, the facts alleged to have been concealed are that "split" transactions were in reality part of the same transaction. Where, as here, the large currency transactions were on behalf of non-taxpaying clients and where the purpose of the concealment was to avoid the filing of CTR's, which have been found by Congress to have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings," the concealment of the fact that the multiple transactions were in fact a single transaction is material as a matter of law.

The currency transactions at issue were clearly within the jurisdiction of a department or agency of the United States, specifically the Department of the Treasury, Internal Revenue Service. The government is not required to prove that the defendant knew that the statement was within the jurisdiction of a federal agency. *See United States v. Yermian,* 468 U.S. 63 (1984).

Therefore, the remaining elements of a violation of 18 U.S.C. § 1001 are that 1) the defendant concealed the fact that multiple currency transactions were in fact one transaction; 2) she did so by trick, scheme, or device, and 3) that she acted willfully and knowingly. As in the case of willfulness, a defendant's knowledge may be shown by circumstantial evidence. *See United States v. Sheiner,* 410 F.2d 337, 340 (2d Cir.), *cert. denied,* 396 U.S. 825 (1969).

Counts One and Two

The government has shown that Perlmutter's office participated in the negotiations and preparation of documents in connection with the Washington transaction and obtained the financial instruments used in that transaction. On January 29, 1981, Perlmutter drew a check for $6,000 as a down payment for the Seventh Avenue properties, pursuant to the contract between Preston Homes and Washington. On March 2, she incorporated the 2283 7th Avenue Corporation on Washington's behalf. On March 11, she purchased, with cash supplied by Washington, eight tellers' checks for a total of $29,000, made payable to herself and to 2283 7th Avenue Corporation. On that same day, $9,800 in cash was deposited in each of Perlmutter's and Muraskin's special accounts at a different bank, Merchants. The depositor used Perlmutter's preprinted form for one $9,800 deposit, and knew Muraskin's account number for the other. The next morning, $200 was deposited in each account, enabling Perlmutter and Muraskin to each draw checks of $10,000, made payable to 2283 7th Avenue Corporation. The deposit slip for the $200 deposit in Perlmutter's account was filled out by Perlmutter; the deposit slip for the $200 deposit in Muraskin's account was filled out by Muraskin. Each of the $10,000 checks were deposited the next day into Perlmutter's account by Muraskin using a preprinted form. They were used to cover a $20,500 check written by Perlmutter to the Title Guarantee Company for back taxes on the property.

Regardless of Perlmutter's extensive participation in the Washington transaction and her position as aunt and employer of David Muraskin, there is reasonable doubt that she participated in or directed the splitting of the $19,600 deposit into two separate $9,800 deposits. Earlier that same day, she took $29,000 in cash to Emigrant Savings Bank, for which a CTR was filed. There is no evidence to explain why she would avoid the filing of a CTR

on one part but not all of a large cash transaction, nor any evidence as to when she first became aware of the CTR procedure. Furthermore, the handwriting expert could not identify the handwriting on the deposit slips as belonging to her, and Laura Nadal identified it as David Muraskin's. The possibility exists that Perlmutter gave Muraskin the cash to take to Merchants, and that he, without her knowledge or direction, decided to break up the deposit. One of the deposit slips was preprinted with her name and account number, but the other was a form obtainable at the bank. This evidence fails to establish proof beyond a reasonable doubt as to Perlmutter's intent.

Counts Seven and Eight

The government has established that Perlmutter participated in a similar fashion in Monsanto's purchase of the Riverdale co-op in August through October, 1982, but with an intent clarified by the preceding events. A year before, Perlmutter had incorporated for Monsanto the Doll Holding Corporation, in whose name Monsanto first attempted to buy the co-op. In October, 1982, Nadal purchased two $5,000 cashier's checks from Republic National on consecutive days, made to the order of Hermena Perlmutter. Ten $500 money orders were purchased from a separate bank on the second day, October 14, half of which were filled out in part by Perlmutter, and the remainder by Muraskin. That same day, two tellers' checks were purchased from yet another bank, from different tellers, and made out to different payees. The request form for the $5,000 check, payable to Hermena Perlmutter, was filled out by Muraskin. Although the co-op was purchased by Monsanto, his name does not appear on any checks, the contract, the deed of sale, or money orders. On each of the checks and money orders, however, appears the legend: Re purchase of Co-op, 3240 Riverdale.

From the credible testimony of Evelyn McLoughlin, the

Emigrant branch manager, who testified that she almost always told her customers when she was filling out a CTR and remembers explicitly telling Perlmutter such on one occasion, it is a reasonable inference that at least as of the time of this transaction and as a consequence of the Washington transaction Perlmutter had the requisite knowledge under 13 U.S.C. § 1001 and § 2 of the CTR reporting requirements.

By October, 1982, McLoughlin had filled out all three CTR's filed on Perlmutter's behalf by Emigrant, and, therefore, had certainly told her of at least one CTR filing. In addition, Nadal, although she had an acknowledged grievance against Perlmutter arising out of her discharge, testified that she overheard at the time of the Washington transaction a conversation between Perlmutter and Tobacman in which CTR's were discussed. Neither the government nor Perlmutter asked Tobacman about the conversation reported by Nadal which at most is icing on the inference arising from the undisputed facts.

The circumstances surrounding the Monsanto transaction demonstrate Perlmutter's intent to circumvent the requirements, as well as her connection to the $5,000 and $7,000 transactions. The testimony of Nadal about delivery of cash in the briefcase by Monsanto has the ring of truth, despite Nadal's hostility to Perlmutter. It is entirely reasonable to infer that Perlmutter, on this occasion, directed people in her office and acted herself to take large amounts of cash from a single source, break it into amounts of less than $10,000, and engage in transactions at different banks and in the name of different payees in order to hide from the different banks the fact that it came from a single source and the identity of the source. Nadal's purchase of the two $5,000 cashier's checks, made out to Perlmutter, from Republic National Bank on two consecutive days must logically have been done at the direction of Perlmutter.

Similarly, it is only logical that Perlmutter either purchased herself or sent someone like Muraskin to Union Federal Savings to get the $5,000 in $500 money orders, and to Emigrant to get the teller's checks. Muraskin's writing is on the only available check requisition form, for $5,000, from Emigrant. Only a customer of the bank, which Manson was not, could obtain a teller's check. If Perlmutter herself was at the bank with Muraskin, standing in a different line, she clearly had the requisite intent to break the $12,000 they walked in with into amounts that would not trigger the CTR reporting requirement. Even if Perlmutter was not with Muraskin, the inference that she explicitly or implicitly directed him to split the transaction is compelling. For even if Muraskin acted without Perlmutter's knowledge in connection with the March, 1981 Washington transaction, it strains belief that he did so again here. Perlmutter certainly knew of the two $9,800 deposits in the Washington transaction immediately after the fact, since the next day she and Muraskin each filled out a $200 deposit slip and each wrote a $10,000 check for the Washington closing. It is a logical inference that she knew why it was done, since she was told that day by McLoughlin that a CTR had been filed, and since Nadal testified to overhearing the conversation about CTR's. Even if she gave $12,000 to Muraskin in October, 1982 with the innocent instruction of "Get some checks," she must have known and, given all the circumstances, must have intended that he would split the transaction.

There is no direct evidence of why Perlmutter concealed the fact that some transactions were in actuality a single transaction and did not conceal the fact that the $120,000 deposit went for a single purpose, or why she broke down the amounts of the instruments used for the purchase of the Riverdale co-op and yet wrote "purchase of co-op, 3240 Riverdale" on each of them. Neither is there an explanation of why Perlmutter caused a bank to fail to file a CTR on at least one occasion and did not cause

banks to fail to file a CTR on four other occasions.[9] Nevertheless, it is a wholly reasonable inference that she intentionally avoided CTR reporting requirements on the occasion of the Monsanto transaction by directing people in her office to engage in multiple transactions at multiple banks with multiple payees and no reasonable doubt can be entertained to the contrary.

These facts establish that Perlmutter acted willfully, under 13 U.S.C. § 2(b), in the sense that *Heyman* defines it — with knowledge of the CTR reporting requirements and with the intent to cause the bank to fail to file a CTR. At the time of these acts, however, *Heyman* was inchoate. Although the statute does not state that a private person's conduct in causing a bank to fail to file constitutes a criminal act, and even though the bank did not violate the law by virtue of the fact that it did not know that this was a single transaction, *Heyman* requires that this court find Perlmutter guilty of Counts Seven and Eight.

Therefore, because Perlmutter knowingly and intentionally caused Emigrant, by the device of splitting up a $12,000 transaction into amounts less than $10,000, to fail to file a CTR, Perlmutter is found guilty as charged on Counts Seven and Eight.

Count Ten

Unlike Counts One and Seven, which charge concealment of a material fact under 18 U.S.C. § 1001, Count Ten charges Perlmutter with making a false statement within the jurisdiction of a department or agency of the United States, specifically, the IRS, as prohibited by the same section. In the case of false representation, there is no requirement in the Second Circuit that

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9. The fourth CTR was filed on October 26, 1981 and has not been shown to be related to the transactions at issue here.

the false statement be shown to be material. *See, e.g., United States v. Elkin,* 731 F. 2d 1005, 1009 (2d Cir.), *cert. denied,* 469 U.S. 822 (1984).

To establish a violation of 18 U.S.C. § 1001, the government must prove that 1) the defendant made a false statement on or about May 9, 1984, 2) the statement was made with the knowledge that it was false, 3) the statement was made unlawfully, knowingly, and willfully, and 4) the statement was made in relation to a matter within the jurisdiction of a department or agency of the United States. *See* 1 L. Sand, J. Siffert, W. Loughlin, S. Reiss, Modern Federal Jury Instructions (Criminal) 36-25 (1985); *United States v. Silva,* 715 F.2d 43, 49 (2d Cir. 1983) (citing *United States v. Adler,* 380 F.2d 917, 920 (2d Cir.), *cert. denied,* 389 U.S. 1006 (1967), and *United States v. McCue,* 301 F.2d 452, 454 (2d Cir.), *cert. denied,* 370 U.S. 939 (1962). Section 1001 has been held to apply to false statements made during the course of an IRS interview. *See United States v. Morris,* 741 F.2d 188 (8th Cir. 1984); *cf. United States v. McCue, supra,* 301 F.2d 452 (defendants convicted on basis of statements made under oath).

As to the element of falsity, the government must show "that the defendant either knew the statement was false . . . or acted with a conscious purpose to avoid learning the truth." *United States v. West,* 666 F.2d 16, 19 (2d Cir. 1981). Otherwise stated, the element is satisfied if the defendant knowingly and willfully "acted with . . . disregard of whether the statements made were true or with a conscious effort to avoid learning the truth . . . even though . . . not specifically aware of the facts which would establish the falsity of the statements." *United States v. Sarrantos,* 455 F.2d 877, 881 (2d Cir. 1972); *United States v. Egenberg,* 441 F.2d 441, 444 (2d Cir.), *cert. denied,* 404 U.S. 994 (1971); *United States v. Hanlon,* 548 F.2d 1096, 1101 (2d Cir. 1977). However, the defendant would not be guilty if the court finds that the defendant in fact believed the statements to be true. *See, e.g.,*

United States v. Morales, 577 F.2d 769, 773-74 (2d Cir. 1978).

Special Agent Polvere, a credible witness, testified that Perlmutter stated to him on May 9, 1984 during the course of an IRS interview that she did not have the $120,000 check or her Merchants November 1981 bank statement, although she had already looked for them at the bank's request. The statement that she did not have the records was proved false in the summer of 1985 when Bernard Tobacman went to Perlmutter's files and pulled out the records in question.

There is reasonable doubt, however, both that a false statement was actually made and that Perlmutter knew it to be false. Although Polvere took notes immediately after the interview of what had transpired, he did not take notes contemporaneously with the interview. Therefore, the context of this statement is not fully recorded. Perlmutter may have meant that she did not have the statement and check available. Alternatively, since she also stated that the $120,000 had nothing to do with Washington and that she would not discuss her dealings with clients, she may have meant that she would not give Polvere any documentation of her dealings with other clients.

Even if Perlmutter meant to state that she did not have the statement and check, there is reasonable doubt that she believed that representation to be false. The evidence did not show that Perlmutter knew where past records were. She did not personally file the bank statements and checks in the cardboard box in which they were kept. After she placed the most recent ones in her desk drawer, Tobacman or his daughter moved them from there to the box in the cabinet. In 1984, Perlmutter may not have known whether her 1981 records were merely hiding in one of her cabinets or lost. Neither Nadal nor anyone else testified as to Perlmutter's knowledge in this regard.

Finally, Perlmutter may have looked for the records in the right place and simply have overlooked them. Although one might surmise that she may have never looked for them, knowing that the bank had no records of this transaction, there is reasonable doubt that she knew her statement to be false when she told Polvere that she did not have the records.

Therefore, Perlmutter is found not guilty on Counts One, Two, and Ten, but guilty on Counts Seven and Eight.

IT IS SO ORDERED.

DATED: New York, N.Y.
February 19, 1987

s/ R.W. Sweet
ROBERT W. SWEET
U.S.D.J.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 20, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Cr. 207 (RWS)

UNITED STATES OF AMERICA,

-against-

HERMENA PERLMUTTER,

Defendant.

OPINION

APPEARANCES:

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SWEET, D.J.

Defendant Hermena Perlmutter ("Perlmutter") has moved pursuant to Fed.R.Crim.P. Rule 12(b)(2) for dismissal of counts one through eight of the nine-count superseding indictment filed April 17, 1986 charging violations of the Bank Secrecy Act on the grounds that these counts are facially insufficient. For the reasons set forth below, the motion for dismissal of counts one through eight is granted.

The Indictment

The counts of the indictment challenged here relate to the financial services which Perlmutter, an attorney, performed for clients in connection with her legal representation. Four transactions are principally at issue, each giving rise to a pair of indictment counts comprising the eight counts at issue. Each pair, as it relates to a transaction, will be individually summarized as set forth in the indictment and the moving papers.

Counts one and two of the indictment relate to Perlmutter's services in connection with her purchase of real estate on behalf of a client, Daniel Washington, in March, 1981. According to the government, Perlmutter assisted Washington in "laundering" money obtained from the drug trade by making two deposits of $9,300.00 on March 11, 1981, each in different bank accounts, at the Merchants' Bank of New York followed by an additional $200.00 deposit in each account the following day. No Currency

Transaction Report ("CTR") was filed for these transactions. Count One of the indictment charges that the defendant concealed from the Department of the Treasury and the Immigration and Naturalization Service the fact that "facially separate" deposits of United States currency were made in violation of 18 U.S.C. sections 1001[1] and 2(b)[2], which proscribe respectively concealment of material information from the federal government and aiding and abetting or causing the banks to commit a crime.

Count Two charges Perlmutter with aiding and abetting, in violation of 18 U.S.C. 2(b), the Merchants Bank to fail to file a CTR in violation of the Currency Transaction Reporting Act, 31 U.S.C. § 5311 *et seq.*,[3] otherwise known as the Bank Secrecy Act. In essence, Counts One and Two charge Perlmutter with structuring her transactions to avoid triggering the bank's $10,000 reporting requirement.

Counts Seven and Eight involve the same pattern of transactions in furtherance of another real estate purchase on behalf of Perlmutter's clients. According to the government, on October 14, 1982, Perlmutter purchased two Emigrant Savings Bank tellers' checks for $5,000.00 and $7,000.00 in different names to avoid exceeding the $10,000.00 reporting limit. No CTR was filed for this transaction, and the government similarly has charged violations of 18 U.S.C. § 1001, 2(b) and 31 U.S.C. § 5311 *et seq.*

Counts Three through Six of the indictment pertain to a single real estate transaction but involve two separate currency transactions which support the related "pairs" of indictment counts. The government claims that on August 19, 1981 Perlmutter purchased tellers' checks from Emigrant Savings Bank in her own name in the amounts of $5,000.00, $3,500.00 (two) and $2,000.00, totalling $14,000.00 in a single day. While a CTR was filed for these checks, the government contends that Perlmutter withheld or concealed the person on whose behalf the transaction was made,

in violation of 18 U.S.C. § 1001 and 2(b). Count Four derivatively charges that this failure to disclose the principal of the transaction caused the Emigrant Savings Bank to file a false CTR with respect to the purchase of $14,000.00 of tellers' checks in violation of the Bank Secrecy Act and 18 U.S.C. § 2(b). Counts Five and Six charge violations of the same section respectively for a November 9, 1981 purchase of a certified check in the amount of $120,000.00. A CTR was also filed for this real estate transaction, but it did not reveal that the transaction was on behalf of anyone other than Perlmutter.

Perlmutter, through each of the four transactions, is thus alleged to have violated 18 U.S.C. § 1001 by withholding or concealing from the government material information concerning the transactions, and is alleged to have violated 18 U.S.C. § 5311 *et seq* by causing the banks to file an inaccurate CTR or not to file a CTR at all.[4]

Statutory Scheme

Section 5313 of the Currency Transaction Reporting Act authorized the Secretary of the Treasury to require financial institutions and other participants in certain currency transactions to file a CTR detailing the transaction for the Secretary:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes) in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution, and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the

> way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. § 5313(a).

The Secretary chose to exercise only a subpart of this plenary power to require institutions and other participants to file CTRs. The Secretary's regulations in effect at the time of these events subjected only financial institutions (defined in 31 U.S.C. § 5312(a)(2)), and not individuals to this reporting requirement for transactions in currency of over $10,000.00:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a) (1982).[5]

The reporting form which the Secretary issued during the relevant period was Internal Revenue Service ("IRS") Form 4789, the only IRS document to mention the problem of multiple transactions designed to avoid the $10,000.00 reporting threshold.[6]

> Each financial institution must file a Form 4789 for each deposit, withdrawal, exchange of currency or other payment or transfer, by, through or to that financial institution, which involves a transaction in currency of more than $10,000.

> Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction if the financial institution is aware of them.

Congress has enacted, in the intervening period between these financial transactions and the present, section 6050 I of the Internal Revenue Code, 26 U.S.C. § 6050I (West Dec. 1984), which places a similar reporting burden on any person who receives in excess of $10,000 in one or two or more related transactions, provides in part:

> (a) Cash Receipts of more than $10,000.00 — Any person —
>
> (1) who is engaged in a trade or business, and
>
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions).
>
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

Therefore, this court, analyzing the indictment under statutes predating section 6050I, faces a limited, but, nevertheless, important statutory ambiguity.

Discussion

This facial challenge to the Perlmutter indictment poses a question without prior Second Circuit treatment,[7] in the context

of a split of opinion among the circuit courts. Counts One through Eight of the indictment essentially charge Perlmutter with "structuring" her financial dealings for clients to avoid the $10,000.00 reporting requirements in 31 C.F.R. § 103.22. Although there is no dispute that only the bank is required to file a CTR in such an instance, the government asserts that this avoidance tactic constitutes aiding and abetting, 18 U.S.C. § 2(b), or causing the bank to violate the Bank Security Act, 31 U.S.C. §§ 5313, 5322 and causes the concealment of material facts from the federal government in violation of 18 U.S.C. §§ 1001, and 2(b).

Perlmutter, relying on the "void for vagueness" analysis in the recent opinions of the First Circuit in *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985) and the Ninth Circuit in *United States v. Varbel,* 780 F.2d 758 (9th Cir. 1986) contends that the imposition of criminal sanctions under these circumstances violates her Fifth Amendment due process rights because she had no fair warning or notice that structuring her transaction to avoid reporting statutes would result in criminal penalties. According to Perlmutter, the Secretary's decision to use only a a small part of the plenary power granted by 31 U.S.C. § 5313 by requiring only financial institutions to file a CTR, 31 CFR § 103.22, reinforced the impression that private persons would not incur criminal liability for apportioning transactions to avoid reporting, as they had no independent duty to consolidate those transactions or inform the bank of their existence. As the *Anzalone* court observed, the Comptroller General of the United States specifically noted in a Report to Congress that the Secretary's regulations ". . . were silent on the propriety of a customer's conducting multiple transactions to avoid reporting." 766 F.2d at 681-82, *citing* "Bank Secrecy Act Reporting Requirements Have Not Yet Met Expectations, Suggesting Need for Amendment," GED-81-80, July 23, 1981.

The government relies principally on two earlier Fifth and Eleventh Circuit cases, *United States v. Tobon-Builes,* 706 F.2d 1092 (11th Cir.), *reh. denied,* 716 F.2d 914 (1983) and *United States v. Thompson,* 603 F.2d 1200 (5th Cir. 1979) and their district court progeny, to support the contention that criminal sanctions may be imposed on those who purposefully attempt to circumvent the bank's filing of a CTR, particularly in instances when same-day transactions are fractured so that no single exchange reaches the $10,000 limit which if combined would require the bank to file a CTR. The government thus embraces the "substance over form approach" of *United States v. Tobon-Builes, supra,* 706 F.2d at 1098 explicitly rejected by the *Anzalone* court:[4]

> In the instant case, Tobon's wilfulness was clearly established by evidence showing he knew about the currency reporting requirements and that he purposely sought to prevent the financial institutions from filing required reports by using false names and by structuring his transactions as multiple smaller transactions under $10,000. Moreover, because of Tobon's deceptive transactions, the financial institutions, i.e., the innocent intermediaries, were duped into not reporting currency transactions they would have had a duty to report had they known about Tobon's scheme. Thus, by operation of § 2(b), Tobon's criminal intent to cause concealment is joined together with his innocent intermediaries' duties to report (i.e their capacity to commit the crime of concealment) and their failure to report (i.e "the forbidden act") to constitute the elements of actionable concealment under § 1001.

Id. at 1101. *See also United States v. Richter,* 610 F. Supp. 480 (N.D.III. 1985), *aff'd.* 785 F.2d 312 (7th Cir 1986); *United States v. Konefal,* 566 F. Supp. 698 (N.D.N.Y. 1983).

While the bootstrapping of aiding and abetting crimes with hypothetical bank violations is an appealing way to punish clear attempts to circumvent the important purposes behind the Bank Secrecy Act, it employs a "cart-before-the-horse" reasoning which the First Circuit in *Anzalone* correctly identified as a threat to due process protections. The government's theory would convict Perlmutter for causing the bank to fail to file CTR's on transactions which, had they been grouped together, would have required that a CTR be filed. Although nothing in Title 31 or the implementing regulations prohibited financial posturing in avoidance of the $10,000 limit, the failure to file such a report supplies the "crime" underlying the aiding and abetting violation in the government's view. As the *Anzalone* court observed:

> If the government wishes to impose a duty on customers, or "other participants in the transaction" to report "structured" transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation.
>
> * * *
>
> As no such duty existed on behalf of the appellant to report to the Secretary either directly or through the financial institution, there can be no concealment in violation of 18 U.S.C § 1001 . . . The 18 U.S.C. § 2 allegations must also therefore fail since appellant did not abet or cause anyone to commit a crime against the United States. The Bank, under the circumstances of this case, did not commit any crime by failing to report transactions, as it lacked knowledge of their "structured" nature.

United States v. Anzalone, supra. 766 F.2d at 682-683.[9]

The same is true for Counts Three, Four, Five and Six of the indictmment, which charge Perlmutter under 18 U.S.C. §§ 2(b), 1001 with causing the bank to file false currency transaction reports which failed to disclose the party or whom the transaction was being made. Section 2(b) and 1001 liability for falsifying or concealing a material fact from the government is dependent upon the applicability of the Bank Secrecy Act reporting requirements to Perlmutter. The only mention of a duty to disclose the principal of the transaction appears in the enabling statute 31 U.S.C. § 5313, which instructs that "A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made." 31 U.S.C. § 5313(a). However, all mention of these "participants" was eliminated from the implementing regulations, 31 CFR § 103, 22(a) (1984) which imposed no such duty on the bank. Although form 4789 calls for, among other information, the name and address of a person on behalf of whom the transaction is being conducted, this form places the reporting duty on the bank and not the customer who makes the financial exchange and as discussed *supra*, was not a properly adopted agency rule. As the court in *Anzalone* succinctly stated:

> But in prosecuting a § 1001 concealment violation, it is incumbent upon the government to prove that the defendant has a *legal duty* to disclose the material facts at the time he was alleged to have concealed them . . . As no such duty existed on behalf of appellant to report to the Secretary either directly or through the financial institution, there can be no concealment in violation of 18 U.S.C. § 1001.

United States v. Anzalone, supra, 76 F.2d at 683 (citations omitted) (emphasis in original); *see also United States v. Varbel, supra,* 780 F.2d at 762 (since appellants had no duty to report their currency transactions to or through the bank, there can be no concealment in violation of 18 U.S.C. § 1001). *Contra United States v. Cook,* 745 F.2d 1311, 1314-1315, (10th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S. Ct. 1205 (1985); *United States v. Puerto,* 730 F.2d 627, 633 (11th Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 162 (1984).

The government objects to this void for vagueness or lack of notice argument contending that the presence of Perlmutter's explicit intent to structure the transaction to avoid the $10,000 threshold belies a claim that the statute is so vague that she was unaware of what would trigger the reporting requirements under the statute. The government is clearly correct in concluding that Perlmutter intended to avoid reporting requirements, as the intent inherent in depositing $9,800 in two accounts on one day, followed by $200 the next, speaks for itself. However, focusing on the "structuring" intent does not mean that Perlmutter had notice that the explicit $10,000 line drawn by the government would be blurred by an intent analysis. While it is unfortunate that what some would label improper avoidance behavior cannot be punished in this instance, the due process clause requires that a criminal offense must be explicit, and not merely inferrable from the relevant statute. *See United States v. Varbel, supra,* 780 F.2d at 762; *United States v. Anzalone, supra,* 766 F.2d at 682; *contra United States v. Cook, supra,* 745 F.2d at 1316 (because a person of ordinary intelligence would be on notice that [such] conduct was prohibited by the statute, 31 U.S.C § 5313 is not unconstitutionally vague as applied to defendant).

The government contends that prior Second Circuit precedents interpreting section 2(b) liability are dispositive of this issue in the absence of explicit Second Circuit authority on the Bank

Secrecy Act. The government cites *United States v. Ruffin,* 613 F.2d 408 (2nd Cir. 1979) and *United States v. Margiotta,* 688 F.2d 108 (2nd Cir. 1982), *cert. denied.* 461 U.S. 913 (1983) for the proposition that Perlmutter can be liable for causing an innocent intermediary, in this case the bank, to commit a criminal act, although only the bank had a reporting duty under the relevant statute. In *United States v. Ruffin, supra,* the defendant was convicted for causing a local community organization to fraudulently obtain funds from the office of Economic Opportunity, chartered pursuant to the Economic Opportunity Act of 1964, 42 U.S.C. § 2701. The defendants scheme was carried out through the acts of a director of the intermediary agency receiving the federal funds, who was not convicted under the statute. In construing section 2(b) to permit a criminal conviction for causing the intermediary to violate the Economic Opportunity Act (which only the officer of the agency had the capacity to violate) the court observed:

> The guilt or innocence of the intermediary, therefore, becomes irrelevant in determining whether a person charged as a co-principal under § 2(b) may be found guilty. . . The issue before us, therefore, narrows down to whether one who would be incapable of violating that law if he acted alone (i.e., Ruffin) may nevertheless be found guilty where he causes the prohibited conduct to be committed by another who has the capacity to violate it. . . but who has been acquitted. We are persuaded that such a "causer" may be found guilty under § 2(b).

The Second Circuit applied the same "causer" principles in *United States v. Margiotta, supra,* to hold that Margiotta, the chairman of the Nassau and Hempstead Republican parties, was guilty of causing an innocent elected town official to appoint a

preselected town insurance broker who would effectuate a kickback scheme in insurance payments. The Circuit Court held that although Margiotta was not directly guilty of extorting moneys pursuant to the Hobbs Act, 18 U.S.C. § 1951, as it proscribes extortion "under color of official right," 18 U.S.C. § 1951(b)(2), Margiotta could be convicted for causing the intermediary to commit the crime. Construing section 2(b) the court stated:

> This section is based on the precept that an individual with the requisite criminal intent may be held liable as a principal if he is a cause in fact in the commission of a crime, notwithstanding that the proscribed conduct is achieved through the actions of innocent intermediaries. . .
>
> . . .
>
> It is unnecessary that the intermediary who commits the act have a criminal intent.

Id. at 131.

While the *Ruffin* and *Margiotta* cases bear a skeletal resemblance to the issue at hand, the reasoning which applies the circumstances of these prior § 2(b) cases to the Bank Secrecy Act fails for the same reason as the government's "intent" analysis above. In both *Ruffin* and *Margiotta,* the Second Circuit *assumed* the criminality of the ultimate acts of fraud and extortion respectively; indeed the criminality of those ultimate acts was not disputed; rather it was the innocence of the intermediary which gave concern to the Second Circuit when applying the section 2(b) analysis. The same cannot be said for applying this analysis to the case at bar. The rationale of *Ruffin* and *Margiotta* appears to assume the criminality of the ultimate act of the innocent intermediary, the precise issue which according to *Anzalone* cannot

be established under this statutory scheme. By retroactively recharacterizing these transactions as transactions which would have violated the Bank Secrecy Act, the government is able to impute "criminal intent" to Perlmutter where she had no duty to file CTRs in the first place. In essence, this projection of prior section 2(b) analysis leaps over the central question of whether avoidance behavior or the structuring of deposits was criminal at all under the Treasury regulations then in effect.

In short, the question unearthed by the *Anzalone* court is, regardless of Perlmutter's intent, whether she had notice that this avoidance behavior would subject her to criminal penalties. Answering in the negative, the First Circuit analysis places the notice dilemma in its constitutional context, and in this court's opinion displaces the less searching analysis of the *Thompson* and *Tobon-Builes* courts. Perlmutter's motion is granted, and counts one through eight of the indictment are therefore dismissed.

IT IS SO ORDERED.

DATED: New York, N.Y.
May 20, 1986

s/ R.W. Sweet
ROBERT W. SWEET
U.S.D.J.

1 § 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3 Counts one through six of the indictment occurred prior to the recodification of the Act on September 13, 1982, Pub.L. 97-258. Section 1081, corresponding to effective Section 5313 stated in relevant part:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail

> as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, in such amounts as the Secretary shall by regulation prescribe.

4 Count Nine of the indictment, which is not challenged in this motion, charges Perlmutter with inducing a witness to make false or misleading statements to a grand jury regarding the preparation of tax returns for a client, in violation of Title 18 U.S.C. § 1503.

5 The Secretary's revised regulations are substantially similar to those in effect in 1982. They provide:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. § 103.22(a) (1984).

6 These admonitions on the currency transaction form do not have the force of law, as they were not rules or regulations adopted by the Department of the Treasury pursuant to the notice and comment rulemaking in Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* *United States v. Anzalone,* 766 F.2d 676, 679 n.6 (1st Cir. 1985); *United States v. Richter,* 610 F. Supp. 480, 489 n.14 (N.D. III. 1985).

7 The Second Circuit has considered the validity of an indictment which charges persons as financial institutions within the meaning of 31 U.S.C. § 5314, *United States v. Goldberg,* 587 F. Supp. 302 (S.D.N.Y. 1984), *dismissal vacated,* 756 F.2d 949 (2nd Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2706 (1985) and will hear an appeal of a verdict based upon a jury charge which incorporated the *Tobon-Builes* analysis in its instructions. *United States v. Heyman,* No. 85 Cr. 31 (S.D.N.Y. 1986).

8 Even prior to the First Circuit's opinion in *Anzalone,* the Eleventh Circuit had begun to question or limit the scope of its decision in *United States v. Tobon-Builes, supra,* in *United States v. Denemark,* 779 F.2d 1559 (11th Cir. 1981). Although the *Denemark* case attempted to limit both the *Tobon-Builes* and *Thompson* cases by distinguishing their facts, the court raised the same due process concerns:

> The recognized fact that Congress sought to give the Treasury an opportunity to obtain information about large amounts of cash cannot have the effect of making criminal conduct that does not fall within the very wide scope of Section 1001.
>
> We must be guided by the Supreme Court's decision in *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939): "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." 306 U.S. at 453, 59 S.Ct. at 619.

Id. at 1563.

9 The government also relies on a post-*Anzalone* decision by the Massachusetts District Court, *United States of America v. Bank of New England N.A.*, No. 85-381-Z (D.Mass., Memorandum Opinion, Jan. 10, 1986) to support its view that the *Anzalone* opinion does not preclude charging a defendant who makes a series of unitary transfers in a single day at a single bank with violations of the Bank Secrecy Act. As the government concedes, however, the bank itself was named as a defendant in the case and was not an "innocent intermediary" caused to violate reporting requirements.

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1053

In the Supreme Court of the United States

OCTOBER TERM, 1987

HERMENA PERLMUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILLIAM F. WELD
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QUESTION PRESENTED

Whether it was unlawful for petitioner, a bank customer, to structure currency transactions in order to cause a financial institution to fail to file Currency Transaction Reports, or to file misleading Currency Transaction Reports.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1053

HERMENA PERLMUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported. The opinions of the district court (Pet. Supp. App. 1-36) are reported at 636 F. Supp. 219 and 656 F. Supp. 782.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for a writ of certiorari was filed on December 11, 1987, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of causing material informa-

tion to be concealed from the Internal Revenue Service (IRS), in violation of 18 U.S.C. 1001 and 2, and one count of causing a financial institution to fail to file a required Currency Transaction Report, in violation of 31 U.S.C. 5312(a)(2), 5313, and 5322, and 18 U.S.C. 2. Imposition of petitioner's sentence was suspended, and she was placed on probation for three years.

1. Under federal law, a financial institution is required to file a Currency Transaction Report (CTR) whenever a customer engages in a currency transaction in excess of $10,000. 31 U.S.C. 5313; 31 C.F.R. 103.22(a) (1982).[1] The

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[1] 31 U.S.C. 5313(a) provides in pertinent part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or under circumstances the Secretary prescribes by regulations, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

At the time of the offenses, 31 C.F.R. 103.22(a) (1982) provided:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

The Currency Transaction Report form requires information regarding the identity of both the individual conducting the transaction and the individual or organization for whom the transaction is conducted. The form also contains the following instruction (Pet. Supp. App. 11):

> Multiple transactions by or for any person which in [any] one day total more than $10,000 should be treated as a single transaction if the financial institution is aware of them.

evidence at trial showed that petitioner, an attorney, laundered more than $200,000 in cash during 1981 and 1982 for three clients whom she represented in connection with purchases of real estate.[2] In each case, the client either had failed to file income tax returns for the period in question or had declared almost no income on his tax returns. In each case, petitioner received cash from her client and used it to purchase negotiable instruments in a manner that either caused the bank to file a CTR that did not disclose the interest of petitioner's client in the funds or caused the bank not to file a CTR at all.

a. In the first transaction, petitioner represented Daniel Washington, who was purchasing four apartment buildings in Manhattan. Washington declared no income from 1979 to 1982 except for $7,900 in 1980, which he claimed to have earned as a "clerk" for one of his corporations. At the closing on the apartment building purchase, which occurred in March 1981, Washington paid $29,000 to the seller and $20,500 to the title insurance company for back taxes on the property. The checks that were used to make those payments were obtained in the following manner:

To cover the $29,000 to be paid to the seller, petitioner on March 11 used cash supplied by Washington to purchase 14 checks at the Emigrant Savings Bank. The checks were in different amounts, all under $5,000. Some were made payable to a corporation that petitioner had incorporated for Washington, some were made payable to petitioner as attorney, and some were made payable to the seller.[3] The bank prepared a CTR for the transaction, but

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[2] The summary of the evidence is taken from the government's brief in the court of appeals.

[3] Petitioner had various personal accounts at the Emigrant Savings Bank. Although it was necessary to be an account holder to purchase

the CTR did not reflect that the transaction was made on behalf of anyone other then petitioner.[4]

Petitioner also made arrangements to generate the funds to cover the $20,500 that was to be paid to the title company. On March 11, petitioner and her associate David Muraskin each deposited $9,800 in cash into their respective accounts at another bank, the Merchants Bank of New York. The following day, they each deposited an additional $200 in cash at a different branch of that bank and drew a $10,000 check on their respective accounts, payable to Washington's corporation. They then redeposited those checks into petitioner's account (Pet. Supp. App. 5-6). Petitioner then drew a certified check for $20,500 from her account to use at the closing.[5]

b. The second real estate transaction involved the August 1981 purchase of a house for Glen and Diane Brown. The house was priced at $140,000. The Browns,

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teller's checks, there was no limit (up to $1 million) on the amount of a teller's check that an account holder could purchase.

[4] Petitioner had several personal accounts with Emigrant Savings Bank. Teller's checks could only be purchased by an account holder. The bank's branch manager testified that, since the bank was not a commercial bank, she assumed that petitioner's transactions were personal. The manager, who filled out three CTRs with respect to petitioner's transactions during 1981 and 1982, also testified that she almost always told a customer who engaged in a large transaction that she was filling out a CTR. On one occasion, petitioner acknowledged the information and stated that she "had nothing to hide."

[5] The two $9,800 transactions were the subjects of Counts One and Two, on which petitioner was acquitted. The district court found a reasonable doubt that petitioner had participated in or directed the splitting of the $19,600 into two transactions (Pet. Supp. App. 15-16). The court cited the fact that a CTR was filed the same day for petitioner's $29,000 in transactions at Emigrant Savings Bank and found there was no evidence as to when petitioner learned of the CTR requirement or whether petitioner filled out the deposit slips (*ibid.*).

who had filed no income tax returns for the years 1979-1982, offered that sum on the spot.[6] To cover the down payment, petitioner purchased four teller's checks at the Emigrant Savings Bank with $14,000 in cash, mainly in small bills. The checks were all payable to petitioner as attorney, and were in the amounts of $5,000, $2,000, and two for $3,500. Petitioner deposited the checks over a two-day period in her special account at the bank. The $126,000 balance of the purchase price was paid at the closing on November 9, 1981. On that day, petitioner deposited $120,000 in small bills into her special account at the Merchant's Bank, drew a certified check, payable to the vendor, for that amount on her account, and added a $6,000 bank teller's check purchased that day to make up the difference. CTRs were filed for both the $14,000 and the $120,000 cash transactions, but the CTRs did not disclose that petitioner was acting on the Browns' behalf. Pet. Supp. App. 8-9.[7]

c. The final real estate transaction involved the October 1982 purchase of a cooperative apartment in the Bronx for $30,000 for Peter Monsanto and Debra Manson, who failed to file income tax returns for the years 1978 through 1982.[8] The total purchase price for the

---

[6] The transactions relating to the purchase of this property were originally the subject of Counts Three through Six of the indictment. Those counts were dismissed before trial on the government's motion.

[7] Petitioner was charged in Count Ten with making a false statement to an IRS agent during an IRS investigation by stating that she had no records regarding the disbursement of the $120,000. The district court found insufficient evidence to convict petitioner of that offense (Pet. Supp. App. 19-22).

[8] Monsanto initially had Perlmutter form a corporation, Doll Holding Corp., to purchase the apartment, but when the seller refused to transfer the co-op shares to a corporation, Monsanto had Debra Manson's name substituted for his own on the contract of sale.

apartment was $30,000, with $3,000 payable at the time the contract was signed and the balance payable at closing. At the time of the closing, Monsanto produced an attache case containing between $25,000 and $30,000 in small bills, which petitioner's former secretary and Monsanto counted in petitioner's office. When petitioner returned, the secretary gave her the attache case. Petitioner then had her secretary purchase two $5,000 teller's checks from the Republic National Bank, which the secretary did on October 13 and 14.

At the closing, the $27,000 purchase price was paid with the two $5,000 Republic National Bank cashier's checks purchased by petitioner's secretary (both of which were payable to petitioner); ten $500 money orders, payable to the vendor, which had been purchased from the Union Federal Savings Bank and all of which listed the "sender" as "Debra Manson"; and two October 14, 1982, Emigrant Savings Bank teller's checks (one for $5,000, to the order of petitioner, and one for $7,000, to the order of Debra Manson). The vendor of the property testified that in the hundreds of closings he had attended, never had he been paid with such an assortment of checks.[9]

An analysis of the Union Bank money orders revealed petitioner's handwriting on five of them and David Muraskin's handwriting on the other five. Although the two Emigrant Savings teller's checks were both purchased at the same branch, each check was obtained from a different teller, indicating that two persons stood in different lines at a branch that was not petitioner's usual branch. Petitioner's secretary identified the handwriting on the cash deposit slip which was located for one of the checks as David Muraskin's and the government relied at trial on

[9] The purchase of the two checks from the Emigrant Savings Bank served as the basis for Counts Seven and Eight, on which petitioner was convicted.

the inference that petitioner was the person who had purchased the other check.

2. Before trial, petitioner moved to dismiss each of the CTR and false statement counts, and the district court granted the motion (Pet. Supp. App. 23-36). The court ruled that it was not criminal for petitioner, as a private individual, to structure her financial transactions in a way that would affect the accuracy of the banks' Currency Transaction Reports (*id.* at 3, 24-36). While the government's appeal was pending, the court of appeals held in *United States* v. *Heyman,* 794 F.2d 788 (2d Cir.), cert. denied, No. 86-5365 (Dec. 1, 1986), that a person could be held criminally responsible under 18 U.S.C. 2(b) for willfully causing a financial institution to fail to file a CTR for a cash transaction in excess of $10,000.

The district court then reversed its earlier decision dismissing the charges against petitioner. After a bench trial, the court convicted petitioner on Counts seven and eight, the counts relating to the purchase of the cooperative apartment by Peter Monsanto and Debra Manson (Pet. Supp. App. 1-22). Although the district court found reasonable doubt as to petitioner's intent with respect to the Daniel Washington transactions, the court found that "at least as of the time of the [Monsanto co-op purchase] and as a consequence of the Washington transaction [petitioner] had the requisite knowledge" of the reporting requirements to require a finding of guilt (*id.* at 17). The court concluded that the circumstances surrounding the Monsanto transaction "demonstrate [petitioner's] intent to circumvent the requirements, as well as her connection to the * * * transactions" (*ibid.*) and that she "knowingly and intentionally caused Emigrant, by the device of splitting up a $12,000 transaction into amounts less than $10,000, to fail to file a CTR" (*id.* at 19).

The court of appeals affirmed petitioner's convictions by judgment order (Pet. App. 1a-2a). The court based its ruling on its own prior decisions in *United States* v. *Nersesian,* 824 F.2d 1294 (2d Cir. 1987), and *United States* v. *Heyman, supra* (Pet. App. 2a).

ARGUMENT

1. Petitioner contends (Pet. 6-15) that this Court should review the government's theory that it is illegal to structure currency transactions so as to avoid the currency transaction reporting requirements. Although there has been some division in the past among the circuits on this and related issues arising from prosecutions for causing financial institutions to fail to file CTRs, that question does not warrant review by this Court. Congress has recently enacted the Money Laundering Control Act of 1986, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. Furthermore, the regulations regarding CTRs have recently been amended to clarify that financial institutions are obligated to file CTRs regarding multiple transactions in a single day that total in excess of $10,000. 31 C.F.R. 103.22(a) (1987); see 52 Fed. Reg. 11437 (1987). The new statute and regulations should entirely vitiate any continuing significance of the question presented in the petition. Accordingly, petitioner's claim, which in any event is meritless even under the prior statutory scheme, does not warrant review by this Court.[10]

[10] This Court has twice previously denied petitions for a writ of certiorari in cases raising the same question. *United States* v. *Heyman* 794 F.2d 788 (2d Cir. 1986), cert. denied, No. 86-5365 (Dec. 1, 1986), and *United States* v. *Giancola,* 783 F.2d 1549 (11th Cir.), cert. denied, No. 86-491 (Dec. 15, 1986).

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Nonetheless, several courts of appeals have recognized that under 18 U.S.C. 2(b) a defendant may be held liable for causing a financial institution to violate its statutory duties. See, *e.g.*, *United States* v. *Richeson,* 825 F.2d 17 (4th Cir. 1987); *United States* v. *Nersesian,* 824 F.2d 1294 (2d Cir. 1987); *United States* v. *Heyman,* 794 F.2d 788 (2d Cir. 1986), cert. denied, No. 86-5365 (Dec. 1, 1986); *United States* v. *Cook,* 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Giancola,* 783 F.2d 1549 (11th Cir. 1986), cert. denied, No. 86-491 (Dec. 15, 1986); *United States* v. *Puerto,* 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson,* 603 F.2d 1200 (5th Cir. 1979).[11]

Other courts have taken a contrary view, holding that, because Section 5313 and the applicable regulations do not themselves impose on third parties a duty to file CTRs, 18 U.S.C. 2(b) cannot be read to impose criminal liability on persons who, by structuring their deposits, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel,* 830 F.2d 621 (7th Cir. 1987); *United States* v. *Larson,* 796 F.2d 244 (8th Cir. 1986); *United States* v. *Varbel,* 780 F.2d 758 (9th Cir. 1986).[12]

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[11] Petitioner's reliance (Pet. 10) on the Eleventh Circuit's decision in *United States* v. *Denemark,* 779 F.2d 1559 (1986), is misplaced, because the defendant in that case did not transact more than $10,000 in business at a single bank. When a defendant engages in that conduct, the Eleventh Circuit has agreed with the court below that a bank is required to file a CTR. *United States* v. *Cure,* 804 F.2d 625, 629 (1986).

[12] Contrary to petitioner's contention, the First Circuit's position is not inconsistent with the decision in this case. In *United States* v.

Whatever the merit of the decisions from the Seventh, Eighth, and Ninth Circuits in construing Section 5313, Congress has totally revised that statute by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the Eleventh Circuit's decision in *Tobon-Builes*. Section 1354 of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," created a new section of Title 31 (Section 5324), which provides, in pertinent part, as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

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Anzalone, 766 F.2d 676 (1985), the First Circuit refused to hold a bank customer liable under 18 U.S.C. 2(b) for causing a bank to fail to file a CTR. In that case, however, the defendant purchased a number of checks on separate days, and the government's argument to the First Circuit did not distinguish those separate-day deposits from the few cash deposits aggregating to more than $10,000 that had been made on a single day. See 766 F.2d at 684 (Aldrich, J., concurring). The First Circuit has since explained that "*Anzalone* did *not* decide whether a customer engages in a reportable transaction when he obtains more than $10,000 by receiving a total of three transfers of currency from two branches of the same bank in a single day. *Anzalone* thus does not foreclose a holding that [those kinds] of transactions are reportable." *United States* v. *Bank of New England, N.A.*, 821 F.2d 844, 851 (1st Cir.), cert. denied, No. 87-368 (Nov. 7, 1987) (emphasis in original).

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *Anzalone* and *Varbel*. The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, an earlier version of the money laundering bill, stated (S. Rep. 99-433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violation of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Goverment a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone,* 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in

> *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same result when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. 99-746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).[13]

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[13] Here, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes*. H.R. Rep. 99-746, *supra*, at 18 n.1.

> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[14]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act.

The court of appeals correctly followed its earlier decisions in *United States* v. *Nersesian, supra,* and *United States* v. *Heyman, supra.* In those cases, the court determined that, although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to breach its duty to file may be held criminally

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[14] For this proposition the House Report cited, inter alia, *Anzalone* and *Varbel.* H.R. Rep. 99-746, *supra,* at 19 n.2.

liable under 18 U.S.C. 2(b). Those holdings comport with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United States." The statute is not limited to cases in which the party who is caused to commit the offenses does so knowingly and for that reason is himself guilty of the offense. Rather, as the Reviser's Note to 18 U.S.C. 2 states, the aiding and abetting statute:

> removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[15]

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[15] The Reviser's Note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of a Federal reserve bank or member bank." 300 U.S. at 43. The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows." *Id.* at 48-49. So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (2d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

The court of appeals properly followed its earlier decisions applying this construction of 18 U.S.C. 2(b) in upholding petitioner's conviction. Although petitioner's structured transactions prevented the Emigrant Savings Bank from learning of its duty to file CTRs, petitioner's success in that endeavor cannot shield her from liability under Section 2(b).

2. Petitioner also claims (Pet. 12-15) that she lacked adequate notice that her method of structuring currency transactions was a crime because it was not accompanied by other wrongful acts, such as the use of an alias. That claim lacks merit. The district court found that petitioner (an experienced lawyer) "acted willfully, * * * with knowledge of the CTR reporting requirements and with the intent to cause the bank to fail to file a CTR" (Pet. Supp. App. 19), and the court of appeals did not disturb that finding (Pet. App. 2a). The requirement that a defendant's acts be willful "provides adequate protection for individuals who might unwittingly stumble into a violation of federal law." *United States* v. *Heyman,* 794 F.2d at 792. See *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 342 (1952) ("culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid"). The district court's finding eliminates any claim that petitioner was somehow surprised by the application of 31 U.S.C. 5313 and 18 U.S.C. 2(b) to her. As this Court put it in *United States* v. *Ragen,* 314 U.S. 513, 524 (1942), "[o]n no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence."

There is no legal basis for petitioner's contention that her conduct could not be criminal unless it was accompanied by some kind of "wrongful act," such as the use of

an alias or the concealment of the fact that she was working with another. None of the decisions on which petitioner relies to support this claim (Pet. 13-14) relied in any way on the additional "wrongful acts" as the basis for finding liability. And even if there were such a requirement, it would be satisfied here, since the conduct that provided the basis for petitioner's convictions served not only to prevent the Emigrant Bank from filing a CTR, but also concealed Monsanto's identity as a purchaser of the apartment, a concealment that had the obvious effect of reducing the risk of provoking an inquiry by federal tax authorities into Monsanto's affairs—something that Monsanto had every reason to fear, since he had failed to file federal income tax returns between 1978 and 1982.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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